179 (2)

No. 10-763

Supreme Court, U.S.
FILED
JAN 7 - 2011
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

TANYA JACKSON, *ET AL.*,
Petitioners,

v.

ESTELLE'S PLACE, LLC, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS AND URBAN AFFAIRS, THE PUBLIC JUSTICE CENTER, THE D.C. EMPLOYMENT JUSTICE CENTER, AND THE NATIONAL EMPLOYMENT LAW PROJECT AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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January 7, 2011

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INTEREST OF *AMICI CURIAE*[1]

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("The Committee") is a non-profit civil rights organization established to eradicate discrimination by enforcing civil rights laws through litigation. In furtherance of this mission, the Committee represents victims of wage and hour violations in individual, class, and collective actions. From these cases, the Committee has amassed expertise in issues arising under the Fair Labor Standards Act ("FLSA"), as well as in awards of attorney's fees to prevailing plaintiffs in civil rights cases generally. The Committee also frequently litigates within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, and thus has substantial familiarity with Fourth Circuit jurisprudence on fee-shifting issues. The Committee was an amicus in earlier stages of the present case.

The Public Justice Center ("PJC"), a non-profit civil rights and anti-poverty legal services' organization, has a longstanding commitment to promoting the rights of low-wage workers. To that end, the PJC has represented thousands of employees seeking to recover unpaid wages from

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[1] No counsel for a party authored or made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have received timely notice of the intent to file this brief and have consented to its filing. The letters of consent have been filed with the Clerk.

their employers through collective and/or class actions under the FLSA and state wage and hour laws, and has also filed *amicus curiae* briefs in cases involving the rights of low-wage workers to collect unpaid wages and attorney's fees under the FLSA.

The D.C. Employment Justice Center ("EJC") is a non-profit organization whose mission is to secure, protect and promote workplace justice in the D.C. metropolitan area. The EJC uses a combination of legal services, advocacy and education, focusing its efforts on low-income workers. Since its founding, the EJC has provided employment law advice and assistance to over 8,000 workers at its free, walk-in legal clinic and has returned more than $5.5 million in wrongfully withheld wages and damages to low-income workers in the D.C. metro area. The EJC addresses the full range of employment law problems faced by low-wage workers, but the failure to pay workers in accordance with the law continues to be the most prevalent problem it sees.

The National Employment Law Project ("NELP") is a non-profit organization that advocates on behalf of low income and unemployed workers. NELP has a long-standing commitment to the enforcement of federal and state wage and hour laws, and has not only represented large collective actions of workers in FLSA cases, but has also provided technical assistance and litigation support to actions across the country that seek to vindicate workers' rights to be paid the wages they are entitled to under the law.

Amici address the significant consequences for low-wage workers of the Fourth Circuit Court of Appeals' holding that trial courts may reduce

attorney's fee awards for prevailing plaintiffs in FLSA cases solely because the damages recovered by the plaintiffs are modest. *Amici* predict that if the Fourth Circuit's holding is allowed to stand, low-wage workers will be left without representation, as private attorneys will be deterred from litigating meritorious FLSA claims. *Amici* thus urge the Court to grant petitioner's Petition.

SUMMARY OF ARGUMENT

Section 216 of the Fair Labor Standards Act ("FLSA") requires courts to award "a reasonable attorney's fee" to a prevailing plaintiff. This case raises two important questions as to when courts may award a prevailing FLSA plaintiff less than the lodestar fee: *first*, whether a court may reduce a prevailing FLSA plaintiff's attorney's fee award based on the "modest" amount of damages recovered by the plaintiff; and *second*, whether a court may reduce a prevailing FLSA plaintiff's award because he or she did not prevail on all of the alternative, non-FLSA legal theories asserted in the complaint. As the Petition demonstrates, the courts of appeals are sharply split on both questions.

In this brief, *amici* address the consequences of leaving in place the Fourth Circuit Court of Appeals' holding that a trial judge may reduce a statutorily mandated attorney's fee award based on the amount of monetary relief obtained by a prevailing plaintiff. *Amici* anticipate that permitting trial courts to consider the size of the monetary award when setting counsel's fees will have a dramatic effect on low-wage workers' ability to seek legal redress for violations of their civil rights, because many low-wage workers

seek damages that, though substantial to them, might otherwise seem "modest."[2]

FLSA claimants who achieve complete success in vindicating the civil rights abuses of their employers often recover less than $1000 in lost wages. According to the Department of Labor, the average FLSA claim in 2008 was for $712. This modest amount is several times larger than the average back wages owed to victims of FLSA violations in certain low-wage industries plagued by wage theft. For example, in the fast food industry, victims of FLSA violations are owed an average of $178 in back wages. As a result, a rule permitting a court to set attorney's fees based on the size of the prevailing plaintiff's damage award will devastate low-wage workers' ability to retain competent counsel.

Imposing additional barriers to low-wage workers' ability to bring private FLSA actions is especially troubling in light of the increasingly critical role that private enforcement plays in protecting against civil rights abuses. Wage theft is a pervasive problem, affecting more than one million workers each week in Chicago, Los Angeles, and New York alone. And, at the same time that low-wage workers have experienced a sharp rise in wage theft, the Department of Labor's Wage and Hour Division's

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[2] Though it is not the focus of this brief, *Amici* agree with petitioner that it is likewise improper for a trial court to reduce an otherwise reasonable attorney's fee award based on the plaintiff's failure to prevail on other claims providing additional remedies. *See* Pet. at 35-36.

enforcement of the FLSA's minimum wage and overtime provisions has become less effective, leaving low-wage workers more vulnerable to wage theft. As a result, low-wage workers increasingly must rely on private causes of action to vindicate violations of their labor rights. It is therefore essential to ensure that these victims can continue to procure competent counsel through attorney's fee awards that are commensurate with the time and effort required to litigate FLSA actions – time and effort that is essentially the same whether the claim is for $100 or for $100,000.

ARGUMENT

I. FEE-SHIFTING STATUTES ENABLE INDIVIDUALS WHO CANNOT AFFORD COUNSEL TO OBTAIN CAPABLE REPRESENTATION TO PROTECT CIVIL RIGHTS.

Though the "American Rule" provides that each party to a lawsuit must pay his or her own counsel fees, this Court has long recognized Congress's power to abrogate this rule to permit prevailing plaintiffs to recover their legal fees from their opponents. *See, e.g.*, *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). Congress has repeatedly determined that an exception to the American Rule is both necessary and appropriate "to ensure 'effective access to the judicial process' for persons with civil rights grievances." *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983) (quoting H.R. Rep. No. 94-1588, at 1 (1976)); *see also id.* at 444 (Brennan, J., concurring in part and dissenting in part) (fee-shifting statutes serve "the need to ensure

that civil rights plaintiffs with bona fide claims are able to find lawyers to represent them").

In fact, Congress has enacted over 100 different statutes that provide a prevailing plaintiff with attorney's fees in a variety of causes of action. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 (1986), *supplemented by*, 483 U.S. 711 (1987). These fee-shifting statutes are especially prevalent in the civil rights context, because Congress has recognized that under the American Rule, several factors operate to impede civil rights litigants' ability to procure representation to vindicate their rights. For example, Congress "found that the private market for legal services failed to provide many victims of civil rights violations with effective access to the judicial process," because "[t]hese victims ordinarily cannot afford to purchase legal services at the rates set by the private market." *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (plurality) (citing H.R. Rep. No. 94-1558, at 3 (1976)). Compounding this problem are various "immunity doctrines and special defenses, available only to public officials," that "preclude or severely limit the damage remedy" available to civil rights litigants. *Id.* at 577 (quoting H.R. Rep. No. 94-1558, at 9). Indeed, often times, victims of federal and constitutional violations seek little to no monetary relief at all. Therefore, counsel may be reluctant or unable to accept important civil rights cases given the real risks of nonpayment for hours, weeks, months, and even years of service.

Yet despite the modest monetary recovery these cases bestow upon prevailing plaintiffs, they

play a critical role in protecting against violations of constitutional and statutory rights and have consequences far beyond both their remunerative value and the benefits provided to any one individual plaintiff. Indeed, Congress recognized the fundamental role private citizens play in protecting federal rights more generally and the need to ensure that private enforcement remains a viable avenue to vindicate civil rights for the benefit of the public. *Hensley*, 461 U.S. at 445 (Brennan, J., concurring in part and dissenting in part) ("[a]ll of these civil rights laws depend heavily upon private enforcement") (quoting S. Rep. No. 94-1011, at 2, *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910).

Accordingly, fee-shifting statutes ensure that those seeking to protect important federal and constitutional rights can obtain counsel to pursue these claims on their behalf. This legislation is designed to "enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible to do so," as Congress recognized that "[i]f private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." *Rivera*, 477 U.S. at 578 (plurality) (quoting S. Rep. No. 94-1011, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. at 5910)). Requiring payment of a prevailing plaintiff's attorney's fees "guarantee[s] reasonable payment for the time and effort expended" on successful claims.

Pennsylvania v. Delaware Valley Citizens' Council For Clean Air, 483 U.S. 711, 726 (1987).

Toward these ends, fee-shifting statutes aim to provide counsel for civil rights plaintiffs a reasonable attorney's fee, i.e., "one that is adequate to attract competent counsel, but . . . [that does] not produce windfalls to attorneys." *Blum v. Stenson*, 465 U.S. 886, 897 (1984) (internal quotation marks omitted) (alterations in original). The fee award must be "sufficient to induce a capable attorney to undertake the representation of a meritorious civil rights case." *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662, 1672 (2010). This Court has consistently found that the lodestar figure – calculated by multiplying the number of hours reasonably spent on the matter by a reasonable billing rate – "yields a fee that is presumptively sufficient to achieve this objective." *Id.* at 1673. Trial courts ordinarily should not alter the lodestar fee since calculation of the lodestar "includes most, if not all, of the relevant factors constituting a 'reasonable' attorney's fee." *Id.* (internal quotation marks omitted).

II. ATTORNEY'S FEES AWARDS ARE CRITICAL TO ENSURE PRIVATE ENFORCEMENT OF RIGHTS UNDER THE FAIR LABOR STANDARDS ACT.

A. The Purpose of the FLSA and its Fee-Shifting Mechanism

In 1938, Congress enacted the Fair Labor Standards Act ("FLSA") "to protect all covered workers from substandard wages and oppressive working hours." *Barrentine v. Arkansas-Best*

Freight Sys., Inc., 450 U.S. 728, 739 (1981). Concluding that both underpay and overwork were "detrimental to the maintenance of the minimum standard of living necessary for health, efficiency and general well-being of workers," *see* 29 U.S.C. § 202(a), the FLSA aims to provide "specific minimum protections to *individual* workers and to ensure that *each* employee covered by the Act would receive [a] fair day's pay for a fair day's work and would be protected from the evil of overwork as well as underpay." *Barrentine*, 450 U.S. at 739 (alteration and emphasis in original) (internal quotation marks omitted).

Indeed, as the congressional record reflects, the statute was designed "to aid the unprotected, unorganized and lowest paid of the nation's working population." *Brooklyn Sav. Bank v. O'Neil*, 324 U.S. 697, 707 n.18 (1945) (citing 81 Cong. Rec. 7652, 7672, 7885; 82 Cong. Rec. 1386, 1395, 1491, 1507; 83 Cong. Rec. 7283, 7298, 9260, 9265; H. Rep. No. 75-1452, at 9 (1937); S. Rep. No. 75-884, at 3, 4 (1937)). As a result, most FLSA plaintiffs cannot afford to hire a lawyer to vindicate violations of the statute. And even when successful, FLSA plaintiffs rarely recover sufficient damages to pay counsel fees. According to the United States Department of Labor, in 2008, the average amount of back pay recovered by a prevailing FLSA claimant was $712. *See* U.S. Dept. of Labor, Wage and Hour Division, 2008 Statistics Fact Sheet, at http://www.dol.gov/whd/statistics/2008FiscalYear.htm [hereinafter *2008 Fact Sheet*] (noting that for fiscal year 2008, "more than 197,000 employees received a total of $140.2 million in

minimum wage and overtime back wages as a result of Fair Labor Standards Act (FLSA) violations").

To ensure that these low-wage workers can access the judicial process to vindicate violations of their rights under the FLSA, Congress included within the statute a fee-shifting mechanism whereby prevailing plaintiffs are entitled to recover reasonable attorney's fees. *See* 29 U.S.C. § 216(b); *see also Fegley v. Higgins*, 19 F.3d 1126, 1134-35 (6th Cir. 1994). The award of attorney's fees to a prevailing FLSA plaintiff is mandatory. *See* 29 U.S.C. § 216(b). Allowing recovery for prevailing FLSA plaintiffs' legal fees enables private citizens to retain capable counsel to prosecute violations of their rights without risking financial hardship to themselves. Shifting a prevailing plaintiff's legal fees to his or her opponent helps ensure private enforcement of FLSA grievances. *See Heder v. City of Two Rivers*, 255 F. Supp. 2d 947, 952 (E.D. Wis. 2003), *aff'd*, 93 F. App'x 81 (7th Cir. 2004); *cf Quaratino v. Tiffany & Co.*, 166 F.3d 422, 426 (2d Cir. 1999) ("Congress enacted fee-shifting in civil rights litigation precisely because the expected monetary recovery in many cases was too small to attract effective legal representation."). By including a fee-shifting provision in the FLSA, Congress sought to enable recovery for victims of FLSA violations for the full amount of back pay or overtime to which they are entitled, plus penalties, without having to then spend this money to cover the legal fees. *See Maddrix v. Dize*, 153 F.2d 274, 275-76 (4th Cir. 1946).

B. The Increasing Need for FLSA Enforcement

Every week, millions of low-wage workers across the country are cheated out of a significant portion of their pay. A 2008 survey conducted by *Amicus* National Employment Law Project ("NELP") revealed that more than one-fourth of the 4,387 low-wage workers surveyed in Chicago, Los Angeles and New York had been paid less than the minimum wage in the previous week, while more than three-quarters of those workers entitled to overtime pay had not received it. Annette Bernhardt et al., *Broken Laws, Unprotected Workers* 2 (2009) [hereinafter *Broken Laws*]. The average worker surveyed earns just $339 a week and had been cheated out of $51, or roughly 15% of his wages, the previous week. *Id.* at 5. According to NELP estimates, employers for over one million workers unlawfully cheat their employees out of more than $56.4 million in wages *each week* in Chicago, Los Angles, and New York alone. *Id.* at 6.

Indeed, over the past several years, the number of FLSA violations has grown dramatically. In 2008, Department of Labor investigators investigated the employers of approximately 77,000 low-wage workers and determined that these workers were owed $57.5 million in earned minimum wage and overtime back wages by their employers – a 77% increase over the amount of back wages WHD investigators determined that investigated employers owed to

workers in low-wage industries in 2001.[3] 2008 Fact Sheet at 3.

In some low-wage industries, non-compliance with the FLSA has become standard industry practice. The restaurant, retail, manufacturing, health care, and construction industries—which collectively provide an estimated 58% of all low-wage jobs—are among the worst offenders. David Weil, *Improving Workplace Conditions Through Strategic Enforcement* 8 (2010) [hereinafter *Strategic Enforcement*]. Study after study has found shocking levels of non-compliance in these industries.[4] Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and*

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[3] This number grossly underestimates the amount of back wages and overtime pay owed to low-wage workers, as it is based only on those cases WHD decided to investigate—a number that reflects only a small fraction of the millions of FLSA violations that occur each year. *See infra* Section II.C.

[4] *See, e.g.*, Restaurant Opportunities Center of New York & New York City Restaurant Industry Coalition, *Behind the Kitchen Door* 14 (2005) (13% of New York City restaurant workers are paid less than minimum wage and 59% were are not properly paid overtime); *see also* U.S. Dep't of Labor, *Nursing Home Compliance Fact Sheet* (2000) (60% of nursing homes are not complaint with the FLSA); Lonnie Golden & Helene Jorgensen, Economic Policy Institute, *Time After Time: Mandatory Overtime in the U.S. Economy* (2002), at 7 (27% of contract construction employees are not properly paid overtime); U.S. Dep't of Labor, *Poultry Processing Compliance Survey Fact Sheet* (2001) (100% of 51 investigated poultry plants are noncompliant with FLSA).

the Underenforcement of the Minimum Labor Standards, 92 Minn. L. Rev. 1317, 1318 (2007) ("Numerous investigations have documented shocking levels of noncompliance with the minimum standards established in the FLSA, particularly in low-wage industries such as the janitorial, food service, garment, and hospitality industries.") For example, NELP found that 40% of the sewing and garment workers it surveyed were paid less than minimum wage and 70% were not properly paid overtime. *Broken Laws* at 39; *see also, e.g.*, U.S. Dep't of Labor, *Close to Half of Garment Contractors Violating Fair Labor Standards Act,* BNA Daily Labor Report (May 6, 1996), *available in* Westlaw 1996 DLR 87; U.S. Dep't of Labor, WHD Press Release: *U.S. Department of Labor obtains default judgment in Southern California garment manufacturer case*, Dec. 14, 2010, *available at* http://www.dol.gov/opa/media/press/whd/whd20101694.htm.

Within particular industries, noncompliance with the FLSA disproportionately impacts minority workers. Studies have shown that women are significantly more likely than men to be cheated out of wages and employers are three times more likely to unlawfully withhold wages from African-American workers than from white workers. *Broken Laws* at 5.

As these statistics demonstrate, the nation is currently facing "a crisis of wage theft." Kim Bobo, *Wage Theft in America* 117 (2009). The Employer Policy Foundation, an employer-supported think tank, estimates that workers would receive an

additional $19 *billion* each year if all employers complied with the FLSA's overtime provision. Craig Becker, *A Good Job for Everyone*, Legal Times, Sept. 6, 2004, at 54. Absent intervention, this crisis will only worsen. When cheating workers out of their earned wages becomes standard practice within an industry, honest employers are unfairly disadvantaged and suffer competitive harm. As a result, they face intense economic pressure to level the playing field by underpaying their workers. Given the scale of the crisis of wage theft facing the nation's workers, and the likelihood that this crisis will worsen absent intervention, there is an urgent need to vindicate violations of the FLSA and to hold employers accountable for the unlawful wage theft.

C. Private Enforcement of the FLSA is Critical

At the same time that theft of low-wage workers' wages and over-time pay has become increasingly prevalent, the government resources devoted to the enforcement of the FLSA have diminished. As of 2008, the Department of Labor's Wage and Hour Division ("WHD")—the division responsible for enforcing the FLSA and other labor laws[5]—had just

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[5] The WHD also enforces government contracts labor standards statutes, the Migrant and Seasonal Agricultural Worker Protection Act, the Employee Polygraph Protection Act, the Family and Medical Leave Act, and certain provision of the Immigration Reform and Control Act of 1986. U.S. Dep't of Labor, Wage and Hour Division Mission Statement, http://www.dol.gov/whd/about/mission/whdmiss.htm; *see also generally* Bobo at 7-15.

750 investigators and is responsible for protecting more than 130 million full- and part-time workers in approximately 7 million workplaces. Bobo, *supra*, at 116-17. Put differently, the WHD had just one investigator for every 170,000 workers and 9,000 workplaces. *Id.*

Indeed, as the labor market has grown, the number of investigators devoted to the enforcement of the FLSA's minimum wage and overtime provisions and the number of investigations handled by each investigator has fallen, rather than increased.[6] In the last three decades, the labor force grew by 52%, but the number of WHD inspectors enforcing federal minimum wage and overtime laws fell by 31%. *Broken Laws* at 52; *see also Strategic Enforcement,* at 6. And, in the last decade, the number of investigations handled by each investigator plummeted. In 1998, the average investigator conducted 52.6 investigations; in contrast, in 2008, the average investigator conducted just 31.5 investigations. *Strategic Enforcement,* at 7. Overall, the WHD conducted 49,521 investigations in 1998 and a mere 23,043 investigations in 2008. *Id.*

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[6] Annette Bernhardt and Siobhán McGrath calculate that between 1975 and 2004 the number of WHD investigators dropped 14%, the number of investigations dropped 36%, and the number of workers paid back wages dropped 24%. Annette Bernhardt & Siobhán McGrath, Brennan Center for Justice, *Trends in Wage and Hour Enforcement in the U.S. Department of Labor, 1975-2004*, 1 (2005). During the same period, the labor force grew by 55% and the number of workplaces grew by 112%. *Id.*

Because of the inadequate resources devoted to public enforcement, the federal government's efforts to enforce the FLSA do little to discourage employers from flouting the FLSA's minimum wage and overtime provisions. Given the limited number of investigators handling such cases, the odds are low that the WHD will investigate even large employers who are likely to be noncompliant with the FLSA's standards. For example, the twenty largest fast food restaurant chains in the United States face a mere 0.008 likelihood that they will be investigated by the WHD in any given year. *Id.*, at 6, 51. And the likelihood that a garden-variety workplace will be investigated is even lower: one study estimates that the probability of an investigation in the average workplace is well below 0.001. David Weil & Amanda Pyles, *Why Complain? Complaints, Compliance, and the Problem of Underenforcement in the U.S. Workplace*, 27 Comp. Lab. L. & Pol'y J. 59, 62 (2005).

Moreover, even if a worker does file a complaint to the WHD, there is no guarantee that it will investigate that complaint. In recent years, the WHD has launched fewer investigations in response to worker complaints. In 2008, the WHD conducted roughly half the number of investigations in response to worker complaints that it did a decade earlier. *Strategic Enforcement*, at 7. A 2009 Government Accountability Office investigation of the WHD reveals that the WHD's failure to respond adequately to worker complaints is the product not only of a lack of manpower, but also of systematic failures within the WHD. U.S. Gov't Accountability

Office, GAO-09-458T, *Wage and Hour Division's Complaint Intake Processes Leave Low Wage Workers Vulnerable to Wage Theft* (Mar. 25, 2009) [hereinafter *Intake Process*]. Of the ten fictional complaints filed by undercover GAO employees, the WHD successfully investigated only one. *Id.* at 4. The WHD's response was "sluggish," the intake process "ineffective," and, in one case, a WHD investigator lied about having investigated a complaint. *Id.* at 1. Moreover, the GAO identified at least 20 specific cases—affecting at least 1,160 real employees—that the WHD had inadequately investigated. The WHD took more than one year to respond to some complaints, closed cases based on unverified denials of employers, and dropped cases when employers did not return phone calls. *Id.* The GAO concluded that its "investigation clearly shows that the Department of Labor has left thousands of actual victims of wage theft who sought federal government assistance with nowhere to turn." *Id.* at 24.[7]

Compounding this problem is the fact that even if a worker's complaint is investigated and the WHD finds that the employee is entitled to back wages, the employee is unlikely to recover the wages owed to him if the employer decides not to pay him. When an employer fails to pay, the WHD refers the case to the

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[7] In response to the GAO's report, the Obama Administration has reportedly added 250 investigators to the WHD in January of 2010. Whether these efforts will address the WHD's manpower shortage and the systematic problems witnessed by GAO is yet to be seen.

Office of the Solicitor to collect on the debt. Like the WHD, the Office of the Solicitor has diminished in size over the past two decades, losing approximately one-fourth of its staff. *Strategic Enforcement*, at 90. This has had an enormous impact on the number of FLSA cases the Solicitor handles because the Solicitor has discretion as to whether to litigate a FLSA case. Lack of resources has led to few litigated cases. In fact, the number of FLSA lawsuits filed by the Solicitor's Office decreased at the same time that violations of the FLSA were on the rise, dropping from 705 in 1987 to 151 in 2007. *Id.*.

The Solicitor's Office's limited capacity to collect employer debts undermines the effectiveness of the WHD's limited enforcement of the FLSA. A 2007 case is illustrative. Masonry Structures, a construction company, had promised to pay eleven workers $13 per hour, but paid them nothing at all. In total, Masonry Structures owed these eleven workers more than $15,000. Six months after the violation was reported to the WHD, a WHD investigator informed the workers that Masonry Structures had agreed to pay. When Masonry reneged on its promise, the Solicitor's Office "considered" suing, but ultimately did nothing. Bobo, *supra*, at 171. Even though the WHD had determined that Masonry Structures had failed to pay these workers, they were no better off for having complained to the WHD, and the employer suffered no penalty for stealing wages and refusing to comply with WHD's determination.

Collectively, the lack of resources at the WHD and the Solicitor's Office and the resulting

unwillingness or inability to investigate and litigate meritorious FLSA complaints has dramatically reduced the federal government's ability to protect low-wage workers against pervasive wage and hour violations under the FLSA. In light of the federal government's failure to vindicate the rights of low-wage workers, "the private bar is carrying most of the burden before the courts." Bobo, *supra*, at 177. While the Solicitor's Office filed only 151 lawsuits in 2007, private attorneys filed over 7,000 that same year. In fact, individual WHD investigators have been known to advise complainants that filing a private suit is their best, or only, option. *See Id.* at 118; *Intake Processes* at 8-9. It is therefore clear that if the law on attorney's fee recovery renders the private bar unwilling to take on meritorious FLSA claims of low-wage workers, those workers will be left without a remedy. *See* Bobo, *supra*, at 177.

III. REDUCTION OF AN ATTORNEY'S FEE AWARD BASED ON THE SIZE OF PLAINTIFF'S RECOVERY WILL HURT LOW-WAGE WORKERS' ABILITY TO RETAIN COUNSEL TO VINDICATE THEIR RIGHTS UNDER THE FLSA

Because low-wage workers must increasingly rely on private enforcement of the FLSA, it is critical that they be able to attract and retain qualified counsel. Traditional fee arrangements do not work for most FLSA claimants, as low-wage workers generally cannot afford to pay an attorney by the hour, and most FLSA claimants' total damages are

insufficient to justify a standard contingent-fee arrangement.[8] For example, the average worker cheated out of wages by one of the top twenty fast food restaurant chains in the United States could recover just $178 in wages, plus liquidated damages, if completely successful in his FLSA claim. *Strategic Enforcement,* at 54. For a fast-food employee working 40 hours per week at the federal minimum wage, this seemingly modest damages award equals well over a week's pay—a significant recovery by most standards. Nevertheless, this amount clearly is insufficient to attract and retain a capable attorney to handle the case on contingency. Even the "simplest" FLSA case "if carried through trial, is likely to require at least ten thousand dollars worth of attorney time and in most cases the fees and costs incurred will be much higher." Becker & Strauss, *supra*, 92 Minn. L. Rev. at 1333.

For these reasons, attorneys representing low-wage workers in FLSA cases rely on the FLSA's fee-shifting mechanism to compensate them for their services in litigating meritorious claims. Indeed, given FLSA claimants' general inability to pay counsel, it is only the prospect of fee-shifting that

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[8] *Gentry v. Superior Court*, 165 P.3d 556, 564 (Cal. 2007) ("[I]ndividual awards in wage-and-hour cases tend to be modest. In addition to the fact that litigation over minimum wage by definition involves the lowest-wage workers, overtime litigation also usually involves workers at the lower end of the pay scale, since professional, executive, and administrative employees are generally exempt from overtime statutes and regulations.").

renders representation possible. The Fourth Circuit's holding in this case will significantly increase the risk that attorneys who achieve complete success on behalf of low-wage workers will not be paid the full lodestar. This, in turn, will make it more difficult for low-wage workers who have been cheated out of FLSA-mandated wages to retain private attorneys to help them recover the wages to which they are entitled, undermining the effectiveness of the FLSA's fee-shifting mechanism. The message the Fourth Circuit has sent to employers is that they face little risk of liability for cheating low-wage workers out of damages that, while significant to the worker, are of "modest value" in comparison to the average attorney's fee. *Jackson v. Estelle's Place, LLC*, No. 09-1700, 2010 U.S. App. LEXIS 16,856, at *7 (4th Cir. Aug. 12, 2010).

Even absent the Fourth Circuit's holding that a trial court may reduce an otherwise reasonable attorney's fee award based on the size of the recovery, attorneys representing low-wage FLSA claimants receive only a discounted fee for their services because the lodestar does not fully compensate attorneys who bring cases under fee-shifting statutes. Rather, when an attorney takes such a case he "assumes a risk of nonpayment" for which the lodestar will not compensate him. *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 483 U.S. 711, 715 (1986); *see also City of Burlington v. Dague*, 505 U.S. 557, 569 (1992) (Blackmun, J., dissenting) ("In many cases brought under federal statutes that authorize fee shifting, plaintiffs will be unable to ensure that their

attorneys will be compensated for the risk that they might not prevail"). While the lodestar is calculated by multiplying the number of hours the attorney devoted to the case by the attorney's customary rate, the customary hourly rates generally reflect lawyers' expectations that they will be "paid promptly and without regard to success or failure." *Hensley*, 461 U.S. at 448 (Brennan, J., concurring in part and dissenting in part). Private attorneys who take cases on contingency, and therefore "tak[e] upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate." *Id.* The premium clients pay when their attorney takes their case on contingency "reflects...the risk of nonrecovery usually borne by clients in cases where lawyers are paid an hourly rate." *Id.* at 448-49. Accordingly, "the expected return from cases brought under federal fee-shifting provisions will be less than could be obtained in otherwise comparable private litigation offering guaranteed, win-or-lose compensation." *City of Burlington*, 505 U.S. at 568-569 (Blackmun, J., dissenting). Given this economic reality, there is a danger that "[p]rudent counsel" will "avoid federal fee-bearing claims in favor of private litigation, even in the very situations for which the attorney's fee statutes were designed" and "even if the fee-bearing claim is more likely meritorious than the competing private claim." *Id.* at 569.

This Court has made clear that the lodestar is designed to be the "fee that is *sufficient* to induce a capable attorney to undertake the representation of

a meritorious...case." *Perdue*, 130 S. Ct. at 1672 (emphasis added). If courts have discretion to reduce a fee award on the grounds that "[a]n attorneys' fee should bear some reasonable relationship to the recovery," *Estelle's Place*, 2010 U.S. App. LEXIS 16856, at *7 (quotation marks omitted), the expected value of a low-wage worker's meritorious FLSA claim will no longer be sufficient to induce a capable attorney to represent him. Equally problematic, there is a risk that different district courts will have different views as to what constitutes a "modest value" warranting a reduction in an attorney's fee award.

Indeed, the Fourth Circuit's decision may lead to the emergence of two tiers of FLSA plaintiffs. The first tier, consisting of claimants owed tens of thousands of dollars or more in back wages, may be able to find a capable lawyer despite the Fourth Circuit's holding, while the second tier, consisting of claimants owed several thousand dollars or even less, may not. In other words, the very lowest paid workers – the precise group the FLSA was designed to protect, *see, e.g.*, *Brooklyn Sav. Bank*, 324 U.S. at 707 n.18 (the FLSA was designed to protect "the unprotected, unorganized and lowest paid of the nations' working population") – will be the first left without legal representation as a result of the Fourth Circuit's holding. This harsh result is inconsistent with the fundamental goal of the FLSA: to provide *all* individual workers with protection from overwork and underpay. *See Barrentine*, 450 U.S. at 739.

Making attorney's fee awards contingent on the monetary relief recovered by a plaintiff not only

undermines the very purpose of the fee-shifting mechanism contained in the FLSA, but it also makes no sense. The Fourth Circuit's holding assumes that attorneys representing low-wage workers with smaller claims of monetary damages do not deserve the same remuneration for their time as attorneys representing clients with larger claims. That is simply illogical. One hour of an attorney's time has the same inherent value whether the claim is for $100 or $10,000 in lost wages. An attorney litigating a FLSA claim for a client will perform essentially the same work regardless of the amount at stake. She will conduct the same type of factual investigation, wrestle with the same legal issues, file the same amount of motions, draft the same type of briefs, and prepare for trial in the same manner, without regard to the damages sought. A rule that permits a reduction of a fee award based on the amount of the damages recovered under the FLSA penalizes those lawyers who represent the lowest paid workers, and severely limits low-wage workers' ability to retain counsel. For these reasons, tying an attorney's recovery to the amount of damages sought is as illogical as it is unjust, and trial courts should not be permitted to reduce an otherwise reasonable attorney's fee award on this basis.

CONCLUSION

For these reasons and those set forth in the Petition, the Petition for Certiorari should be granted.

Respectfully Submitted,

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January 7, 2011